

Telecommunications (Competition Provisions) Appeal Board

Appeal No. 28

Hong Kong CSL Limited and New World PCS Limited v The Telecommunications Authority

Date of appeal	:	6 June 2008
Appellant	:	Hong Kong CSL Limited and New World PCS Limited
Nature of appeal	:	Against the decision of the Telecommunications Authority dated 23 May 2008 that, by virtue of the operation of Special Condition 3.4(b) of fixed carrier licence No. 050, the subject application for revision of the fixed-mobile interconnection charge tariff was deemed to be approved.
Hearings	:	The Appeal Board conducted a hearing on 23 August 2008 to hear the joint Stay Application of the Appellants for Appeal Nos. 27 and 28 (Conjoined) to suspend the operation of the tariff increases payable by mobile network operators to fixed carrier PCCW-HKT Ltd. The Application was not granted. The Decision of the Appeal Board dated 29 September 2008 is attached.
Outcome of Appeal	:	Appeal was withdrawn on 27 August 2009.

Appeal Nos. 27 & 28 (Conjoined)

IN THE MATTER OF THE
TELECOMMUNICATIONS ORDINANCE
(CAP 106)

AND

IN THE MATTER OF AN APPEAL TO
THE TELECOMMUNICATIONS
(COMPETITION PROVISIONS) APPEAL
BOARD PURSUANT TO SECTION 32N
OF THE TELECOMMUNICATIONS
ORDINANCE
(CAP 106)

BETWEEN

HUTCHISON TELEPHONE COMPANY LIMITED and OTHERS

— Appellant —

AND

THE TELECOMMUNICATIONS AUTHORITY

— Respondent —

DECISION on STAY APPLICATION

CHAN Chi Hung SC
Professor LIN PING
Neil Kaplan CBE QC SBS
(Chairman)

29 September 2008

DECISION

- 1 The Board has before it an application on behalf of the three Appellants to these conjoined appeals that the Board should suspend the operation of tariff increases payable by mobile network operators (“MNOs”) to PCCW. The new tariff came into effect on 1 June 2008. This tariff is an increase from 4.36 cents to 5.35 cents per occupancy minute. Over the last few years, PCCW tariffs have been declining.
- 2 The Board heard this application as a matter of urgency on Saturday, 23 August 2008 at the Hong Kong International Arbitration Centre. The Appellants were represented by Ms Teresa Cheng, SC and Mr Adrian Lai, instructed by Freshfields Bruckhaus Deringer. The Telecommunications Authority (“TA”) was represented by Mr Edward Alder, instructed by the Department of Justice. PCCW was allowed to be heard as to the hardship that it would suffer if the order was actually made. They were represented by Mr Graeme Johnston of Herbert Smith. The Board will receive written submissions in due course as to whether it has power to add PCCW as a party to the substantive appeal; and, if it has, should it make such an order.
- 3 This new tariff came about as a result of a confidential application for an increase by PCCW to the TA. This application was made pursuant to the Special Condition (SC) 3.4 of PCCW’s licence, which provides as follows :

*“Any amendment to any published tariff of the licensee for interconnection, which was in force at 1 December 2004 and continues in force, **including those interconnections listed in Schedule 7 [emphasis added], must first be approved by the Authority in writing, and***

- (a) *the Authority shall approve every such amendment where, in the Authority's opinion the amended tariff would not be in contravention of section 7K, 7L or 7N of the Ordinance; and*
- (b) *any such amendment shall be deemed to be approved unless the Authority notifies the licensee in writing, within 30 days after receiving the proposed amendment from the licensee, of the Authority's opinion that the amendment would contravene section 7L, 7L or 7N of the Ordinance."*

4 By letter dated 12 September 2008, the Board informed the parties that it declined to make the order sought and would give reasons later. These are the written reasons for refusing to suspend the operation of the tariff increase.

5 The Board has carefully considered all the written materials and oral submissions placed before it by the Appellants, the TA and PCCW, for which the Board is grateful.

6 On 23 May 2008, the TA issued a Statement dealing with PCCW's application. As the Statement is the basis of the claim that the Board has jurisdiction to consider the appeals and hence this application, it is necessary to set out certain paragraphs that feature heavily in the arguments:

"15. ... In considering a PCCW's tariff amendment application under SC3.4, the TA has three options:

- (a) to approve the application where, in the TA's opinion, the amended tariff would not be in contravention of section 7K, 7L or 7N of the Ordinance (SC 3.4(a));*

(b) within 30 days after receiving the proposed amendment, to disapprove the application if the TA is of the opinion that the amendment would contravene section 7K, 7L or 7N (SC 3.4(b));

(c) not to form a definitive view on whether the proposed amendment would or would not contravene section 7K, 7L or 7N, with the consequence that the amendment will be deemed to be approved after 30 days (SC 3.4(b)).

...

19. *Under SC3.4, the TA is required to consider PCCW's tariff increase application pursuant to section 7K, 7L and 7N. Because the conduct in question is the unilateral increase of PCCW's own FMIC Tariff, no issue arises under section 7K, in so far as section 7K governs operators acting in concert. Section 7N is also not relevant in this case because the FMIC Tariff is applicable to all fixed-mobile interconnections with PCCW. There is no issue of different charges or terms applying to different operators, which is section 7N's focus.*

20. *That leaves section 7L, which prohibits unilateral abusive behaviour of a dominant operator. Two elements are required to establish a contravention of section 7L i.e. that the operator concerned occupies a dominant position in a relevant market, and that its behaviour substantially restricts or prevents competition.*

21. *In the present case, the behaviour under consideration is the levying of a charge of 5.45 cents per minute for interconnections by MNOs to PCCW's PSTN. This price represents an increase of 1.09 cents, or 25%. PCCW has made it plain that the increase is a strategic move to stimulate the MNOs to commence negotiations with PCCW over transitional FMIC arrangements. Of itself, PCCW's declared motive for the increase is not a relevant consideration in relation to SC3.4, which is strictly confined to considerations under section 7K, 7L and 7N by the TA. The question of cost may or may not be relevant to an assessment under section 7L. Competition assessment under section 7L is not concerned only with whether the price is or is not cost-based per se. If costs are relevant at all it is in the context of what the effect of the price is, whether above or below cost, on the process of competition in the relevant market. In fact, the TA has made the following remark in paragraph 25 of the Ex-post Statement:-*

*Where a licensee establishes a tariff for an interconnection, there is no ground for the TA to disapprove it under ex ante regulation unless it is in contravention with the competition provisions under the Ordinance. In particular, **if no anti-competitive purpose or effect can be established, that the tariffed charge is not based on the relevant reasonable cost attributable to interconnection is not a ground for disapproving a proposed tariff for an interconnection** [emphasis added].*

22. *The TA has given some preliminary consideration to the actual market impact the price increase is likely to have on the MNOs. The new price of 5.45 cents represents an increase of 25%, and it is set to last for 11 months to the end of April 2009. In terms of the financial impact that the increase has on the MNOs, the initial view of the TA is that the impact is unlikely to be sufficiently significant and sufficiently long term, to have the character of preventing or substantially restricting competition, even assuming that PCCW's residual but temporary power over the interconnection price with MNOs can be established as a dominant market position.*

23. *That said, because PCCW submitted its application on a confidential basis, the TA has not been able to solicit the MNOs' comments on the FMIC Tariff increase, especially in terms of actual extent of impact the increase may have on their business operations. Therefore, notwithstanding the TA's initial view that the tariff increase would not offend any of section 7K, L, or N, the TA does not consider that it is appropriate to arrive at a conclusive view at this stage.*

Deemed Approval of Tariff Increase

24. *Under the tariff approval mechanism of SC3.4, where the TA does not arrive at a definitive view that the tariff increase would, or would not, contravene section 7K, 7L or 7N, and the*

30 days period has elapsed, PCCW's application for tariff amendment is deemed to be approved.

25. Since the TA has not given positive clearance to the FMIC Tariff increase under SC3.4 and pursuant to consideration of section 7L, the question of whether the tariff increase, once implemented, contravenes section 7L is an open one which can still be considered under the ex post regime i.e. after the increase has come into effect. Any party who considers that the tariff increase has an anti-competitive effect in any telecommunications services market in contravention of section 7L may state its case to the TA. In order that the TA may consider initiating an investigation of section 7L, the requesting party is expected to provide the TA with sufficient information and economic analysis to support a claim of breach of section 7L.”

7 It appears to the Board that the following issues are required to be determined in this application:

- (a) Has the Board jurisdiction to hear the substantive appeals? (It is accepted by Ms Cheng that this application has to fail if there is no jurisdiction).
- (b) If yes, has the Board jurisdiction to grant the stay?
- (c) What is the necessary threshold relating to the merits that the Appellants have to meet for the grant of interim relief?

- (d) Have they met such a threshold in this case?
- (e) If yes, does the balance of convenience favour granting or refusing the order sought?

A. Jurisdiction to Hear the Substantive Appeal

8 The Board is a creature of statute and can only have such jurisdiction as is given by the Telecommunications Ordinance (Cap. 106) (“TO”). Section 32N of TO sets out that

“Any person aggrieved by an opinion, determination, direction or decision of the Authority relating to section 7K, 7L, 7M or 7N ... may appeal to the Appeal Board against the opinion, determination, direction, decision ... to the extent to which it relates to any such section”

9 It is not disputed that the Appellants are persons aggrieved. The more difficult question is to ascertain whether the TA in her Statement made any determination, direction or decision and whether, if she did, that decision, to use the often quoted words of the Court of Appeal, “truly engages” the relevant sections. Mr Alder made a general point about the Statement in his submission (orally and in paragraphs 17 to 19 of his written Respondent’s Supplementary Submissions dated 23 August 2008) that there was no determination or decision by the TA at all because the approval was a deemed approval by virtue of SC 3.4 and not by virtue of any decision by the TA, and that the Statement, made after the deemed approval and not before, should not be construed as containing any decision or reasons by the TA which could engage the relevant sections of the TO. Miss Cheng submitted that such contention was totally without merit. The Board has carefully read the whole of the Statement in the context

of the factual matrix. The Board has in particular considered paragraphs 19 to 23 thereof which explained the TA's consideration with respect to PCCW's application. The Board took into account further Mr Alder's concessions (see paragraphs 11 and 13 below). The Board is of the view that the Statement did set out TA's considerations, and her decisions, if any, with respect to PCCW's application before the deemed approval took effect, even though the Statement itself was made after the deemed approval took effect. The Board will separately consider below the issue whether any decision was in fact made by the TA at all, and whether the relevant sections of the TO were engaged.

10 The relevant paragraphs of the Statement have been set out above. On one view it could be concluded that the TA made no decision at all preferring instead to wait until an aggrieved party stated a case that there was anti-competitive conduct involved.

11 However, at this point it is necessary to record a concession made by Mr Alder on behalf of the TA which appears at page 24 et seq of the transcript. He pointed out that no decision was made in respect of section 7M (as SC 3.4 only refers to an opinion of the TA concerning contravention of sections 7K, 7L or 7N, but not 7M). So only sections 7K, L and N are relevant. Section 7K deals, inter alia, with operators acting in concert and Mr Alder conceded that the TA in paragraph 19 of the Statement did decide that section 7K had no relevance because she stated that PCCW were not acting in concert. That he conceded was not a decision which engaged the whole of section 7K. Insofar as the Appellants contend that PCCW was acting in concert by virtue of a cross-subsidy given to their mobile subsidiary, this was a point which could be the subject of appeal to the Board although it is fair to point out that he also stated that there was no evidence of that at all – only Ms Cheng's assertion in her submissions. This point may be relevant as to whether the threshold has been crossed, but as a strict matter of law, Mr Alder conceded that the appeal was competent on that

issue. Mr Alder submitted that the Appellants had to make out jurisdiction in relation to each decision that they challenged and merely because one decision in the Statement engaged part of section 7K it did not follow that the other decisions which did not engage one of the relevant sections are also within the Board's jurisdiction. The Board accepts that jurisdiction cannot be founded upon a concession by counsel but this was a considered concession by experienced counsel acting for a public body. The Board considers the concession well made.

- 12 Section 7M does not apply because it deals with misleading or deceptive conduct and none has been alleged here. In any event SC 3.4 does not refer to section 7M, but only 7K, 7L, and 7N, and thus, not surprisingly, the Statement did not deal with possible contraventions of section 7M.
- 13 Section 7N is stated not to apply because the tariff is applicable to all fixed-mobile interconnections with PCCW. As stated by the TA there is no question here of different charges or terms applying to different operators. However, Mr Alder conceded that this was a decision as to whether section 7N had been engaged and was thus appealable. However, he reiterated that there was no evidence before the Board to support the suggestion that the TA was wrong as to this decision and thus while accepting that the Board had jurisdiction, nonetheless, the case made did not meet the threshold, whatever that was held to be.
- 14 That leaves the rest of section 7K which is a complex provision dealing with anti-competitive practices. No concessions are made by Mr Alder save for that part dealing with operators in concert. The Board cannot see that any decision has been made under this section apart from that dealing with operators acting in concert.
- 15 Section 7L deals with the abuse of a dominant position. The TA concluded that the increase sought was *“unlikely to be sufficiently significant and sufficiently long-term,*

to have the character of preventing or substantially restricting competition” (see paragraph 22 of the Statement). The TA went on to make clear that she had not been able to solicit MNOs’ views on the tariff increase due to the confidential basis of PCCW’s application and although her initial view was that the increase would not offend the relevant section she did “not consider that it is appropriate to arrive at a conclusive view at this stage”. She concluded that the question of the consideration of section 7L was an open one and could be considered after the tariff came into operation. She made clear that any party who considers that the tariff increase has an anti-competitive effect within section 7L may state its case to the TA.

- 16 The Board doubts that the TA in fact made a decision under section 7L which “truly engages” that section. It is worth noting that the TA has only 30 days to disapprove a tariff increase request under PCCW’s licence and it is just not feasible for a competition law economic analysis to be completed within that time. Such an exercise would be necessary to make a definitive ruling under section 7L.

B. Has the Board Jurisdiction to Grant the Stay?

- 17 All parties agreed that the decision of the Court of Final Appeal in *PCCW-HKT Telephone Ltd. v Telecommunications Authority [2005] 8 HKCFAR 1* makes clear that the Board does have jurisdiction to grant a stay of the decision of the TA.

C. Necessary Threshold

- 18 Mr Alder submitted that the Board should apply the tried and tested criteria set out in *American Cyanamid Co. v Ethicon Ltd. [1975] A.C. 396* namely, that the applicant for interim relief (in that case also an injunction) had to show that there was a serious issue to be tried.

- 19 Ms Cheng, on the other hand, invited us to take the approach of the Competition Appeal Tribunal (“CAT”) in England due to the similar, but by no means identical, statutory framework under which it operated. In both *Napp Pharmaceutical Holdings Ltd. v The Director General of Fair Trading* (Competition Appeal Tribunal, 22 May 2001) and in *Genzyme Ltd. v The Office of Fair Trading* (Competition Appeal Tribunal, 6 May 2003), the CAT preferred and adopted the test laid down by the European Court of Justice in *Commission of the European Communities v Atlantic Container Line AB and Others* [1995] ECR I-2165, namely, to consider whether the application was “*prima facie relevant and not entirely ungrounded*”. The CAT preferred that test to the *American Cyanamid* test partly because it was not dealing with party and party issues and rights.
- 20 The Board is prepared to accept Ms Cheng’s submissions on this point but without deciding it. The Board will subject the Appellants’ case to the least onerous test.

D. Has the Threshold been Met

- 21 In relation to the decision that section 7K has not been engaged, the Board is of the view that no evidence has yet been presented to it to indicate that the TA’s decision that the section has not been engaged was erroneous. It is only a suggestion that PCCW may have granted a cross-subsidy and this comes from Ms Cheng in her submissions and it is stated in the grounds for the interim application by way of a criticism that the TA did not investigate this matter. At this stage this point is one of pure speculation without any evidential basis for it. That is not to say that the point may not be made good at the substantive hearing following discovery and cross examination but, at this stage, it is merely an unsupported allegation. In the opinion of the Board this assertion does not meet even the most lenient threshold test. In relation to the decision that section 7N has not been engaged, the Notice of Appeal (paragraph 3.7(b) thereof) also criticised the TA for failing to consider the relationship

between PCCW and PCCW Mobile and the position of the latter vis-à-vis the other MNOs in connection of the new Tariff, but no evidence has been adduced as to these matters and how a case could be made out as to their engagement or contravention of the relevant sections.

E. Balance of Convenience

- 22 As the Board has decided that such decisions as are within the Board's jurisdiction do not meet the lowest threshold test for the grant of interim relief, it is strictly not necessary to decide the issue as to where a balance of convenience lies.
- 23 However, because the Board has received full and helpful submissions on this point, it may assist if the Board briefly states its conclusions.
- 24 The Board understands how the Appellants feel. The application for the new tariff was made confidentially to the TA by PCCW. The tariff was made public on 23 May 2008 and came into force on 1 June 2008. The Appellants complain that they do not know the basis of the increase and point out that all tariff charges in recent years have been in a downward direction. Also this increase came without notice to the Appellants and they have not been able to budget for such an unexpected increase in their accounts.
- 25 The Appellants are particularly concerned that the stated reason for the increase was a strategic move to encourage the Appellants and other MNOs to negotiate for the post-April 2009 regime when the "*Mobile Party's Network Pays*" arrangement ends (see paragraph 21 of TA's Statement).
- 26 The Appellants have paid what is due under the old tariff and are withholding the increase. They have undertaken that they will pay the disputed difference if they lose the appeals. They contend that PCCW will suffer no harm by the grant of the order.

- 27 The TA takes a neutral stand on the exercise of discretion.
- 28 The Board agreed to hear PCCW on the question of hardship to them. Mr Johnston submitted written submissions and addressed the Board orally. He pointed out that, of all the telecom operators in Hong Kong, it is only PCCW that is bound by the terms of its licence to apply to the TA for a tariff increase. He submitted that in a free market economy, there was really nothing inherently wrong in seeking a price increase. PCCW went through the procedures set out in its licence, and as the application was not opposed by the TA at that stage, then the application was deemed to be approved.
- 29 Mr Johnston pointed it out that PCCW is no longer in a position of presumed dominance, and it is engaged in negotiations with powerful and substantial MNOs. He reiterated that, subject to its licence conditions, PCCW is free, like everyone else, to put their prices up or down.
- 30 Mr Johnston pointed out that the new tariff will only last until April 2009 and that it is extremely unlikely that these appeals would be completed by then. Accordingly, granting the suspension would be tantamount to resolving the merits. If the Board accepted this submission, then he submitted that the Board would have to be satisfied that the Appellants had a very strong case.
- 31 Mr Johnston pointed it out that he was not aware of any evidence before the Board relating to collusion which will be needed to establish a case under section 7K. As to section 7N, he submitted that there appears to be no evidence of that either. As to the section 7L arguments, he reiterated that there is no evidence as to this, and there could not be one without a proper competition law economic analysis which has not yet been done.

- 32 Mr Johnston invited the Board not to be dragged into the complex negotiations which are underway to agree tariffs for the post-April 2009 situation. In fact, the Board should resist all temptation to interfere with the market.
- 33 As to the public interest Ms Cheng raised the spectre of a suspension of services by PCCW if the Appellants did not pay the increase. The Board is not satisfied as to this because it doubts that these large and respectable MNOs will fail to pay the increase once the Board has decided not to stay the coming into force of the increase. In any event the Board is satisfied that the TA has sufficient powers to deal with the threat of such action. Mr Johnston submitted that the parties should be allowed to go on with the negotiation and no interference should take place unless somebody breaches any of the relevant sections of the TO.
- 34 Ms Cheng has argued that the decision was erroneous also as it did not appear that the TA concluded a cost analysis of the increase sought. Mr Johnston responded by saying that the TA had made clear that the absence of cost-related grounds is not a ground per se for refusing approval unless one of the stated sections had been breached (see paragraph 21 of TA's Statement).
- 35 Mr Johnston made the valid point that if the Appellants are going to be prejudiced by the refusal to stay, then PCCW will likewise be prejudiced by its grant.
- 36 The onus is of course on the Appellants. Had the Board got to the balance of convenience issue, the best the Board could say for the Appellants is that the balance is even. The Board would not have been persuaded that the balance comes down sufficiently on the Appellants' side to justify the making of the suspension sought. The Board also thinks that there would be severe problems in identifying the subject matter of the Board's order and drafting the order sought but that is not, in the light of the Board's conclusions, a matter into which it is now necessary to delve.

37 The Board is grateful to all parties for their assistance in this matter. The Board has not set out each and every argument raised in the oral and written submissions but has considered all of them in the course of its deliberations. The Board also makes it clear that, although it has had to address jurisdictional issues in order to deal with the arguments addressed to it, the only decision it makes is not to grant the order sought by the Appellants. Accordingly all jurisdictional issues may need to be re-considered by the Board at the substantive hearing after written submissions, discovery and any oral evidence have been considered.

Dated this the 29th day of September 2008.

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NEIL KAPLAN CBE QC SBS
(Chairman)

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CHAN CHI HUNG, SC
(Board Member)

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PROFESSOR LIN PING
(Board Member)